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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1668

CLIFTON BYRD, et al.,

Petitioners,

versus

CITY OF SAN ANTONIO, et al.,

Respondents.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondents do not deny that the City Public Service Board of San Antonio is "self-perpetuating." Nor do they deny that the employees, funds and property over which the Board holds dominion are public. The Court of Appeals' approval of the self-perpetuating proprietary body and its introduction into American constitutional jurisprudence is a major and potentially expand-

ing innovation in public administration. It warrants the attention of the Supreme Court.

I. The City Public Service Board of San Antonio is a "form of government" subject to the standards of republicanism and voting rights.

The issue in this case is *accountability*. As validated by the Court of Appeals, the legal status of the City Public Service Board presents an extraordinary and unprecedented accumulation of governmental powers, privileges, immunities, funds, personnel and property. Yet there is a complete absence of the constitutional, statutory, regulatory and economic inhibitions which operate upon an entity which is either clearly public or clearly private:

1. The Board has a monopoly upon the sale of electricity and gas in Bexar County, Texas, and in large segments of six adjoining counties. It is impossible to estimate what percentage of the residents of adjoining counties are subject to its rule-making powers, power of eminent domain and power to budget and spend the admittedly "public" funds collected from those areas. But it is undeniable that all 830,460[1] of Bexar County's residents are subject to these powers. Of this larger number, San Antonio's 773,248[2] citizens elect one person to the five-member board. The other four seats are held by self-perpetuating trustees who are totally devoid of either constituency or representative status.

1 United States Department of Commerce, Bureau of the Census, 1970.

2 United States Department of Commerce, Bureau of the Census, 1970.

2. These Board members, four-fifths self-appointed, choose their own successors in office, elect each other to additional terms and have exclusive power over their own removal for cause.[3] Keeping in mind that the trustees may be individually or collectively removable for cause in the event of misappropriation, massive failure of service or the meltdown of a nuclear reactor, their being the judges of their own cause presents a particularly disturbing possibility.

3. A monoply controlling indispensable services is unchecked by competition. Its customers, having no alternatives other than candles, windmills and bottled gas, must accept its services under whatever terms are offered.

4. Having successfully argued that it is a "political subdivision of the State of Texas," the Board has eluded federal regulation.[4]

3 The indenture provides in Article VI, Section 1, "Any member of the Board other than the Mayor of the City may, by unanimous vote of the remaining members of the Board, be removed from office, but only for adequate cause."

4 City Public Service Board of San Antonio and Association de Obreros Mexico-Americanos, 197 N.L.R.B. 312 (1972).

5. By establishing itself as a "municipal corporation," it has evaded state regulation by the Texas Public Utility Commission.[5]

6. It has avoided rendering its income, deposits and property to federal, state and local tax collectors by obtaining adjudications that the payment of such levies would be out of "public money."[6]

7. By consistently asserting that it is a "department or agency of the City,"[7] the Board has secured and is now exercising and enjoying the many other uniquely governmental powers, privileges and immunities which the National Labor Relations Board itemized in its opinion.[8]

8. Upon its contention that the Trustees are "officials of a city" and its labor force consists of "public employees,"[9] such accountability as may arise out of

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5 Morris v. City of San Antonio, 572 S.W.2d 831 (Tex. Civ. App.-Austin 1978, no writ).

6 San Antonio Independent School District v. City of San Antonio, 550 S.W.2d 262 (Tex. 1976) and San Antonio Independent School District v. Board of Trustees of the San Antonio Electric & Gas System, 204 S.W.2d 22 (Tex. Civ. App.-El Paso 1947, writ ref'd).

7 Guadalupe-Blanco River Authority v. Tuttle, 171 S.W.2d 520 (Tex. Civ. App.-San Antonio) aff'd. 141 Tex. 523, 174 S.W.2d 589 (1943).

8 City Public Service Board of San Antonio and Association de Obreros Mexico-Americanos, 197 N.L.R.B. 312 (1972).

9 Alaniz v. City of San Antonio, 89 LRRM 2893 (U.S.D.C., W.D. Tex. 1971).

the collective bargaining process has been circumvented.

Contrary to all of its previous positions, the Trustees have now convinced the Court of Appeals that they are "nongovernmental" and, therefore, immune from "republicanism and voting rights." Petitioners' answer to this contention is both simple and compelling: The Trustees are bound by the adjudications and administrative determinations which they have previously obtained. They cannot be heard to renounce their public status when their sole objective is to frustrate accountability as a public body.

A distinction is drawn by the Trustees between "legislative" bodies, which they admit are subject to "republicanism" and "voting rights," and "administrative and proprietary" bodies, which, they say, are not. As this Court pointed out in *Hadley v. Junior College District*, 397 U.S. 50, 25 L.Ed. 2d 45, 90 S.Ct. 791 (1969), that distinction is obsolete:

> "It has also been urged that we distinguish for apportionment purposes between elections for 'legislative' officials and those for 'administrative' officers. Such a suggestion would leave courts with an equally unmanageable principle since governmental activities 'cannot easily be classified in the neat categories favored by civics texts,' *Avery v. Midland County, supra*, 390 U.S. 474 at 482, [88

S.Ct. 1114, 20 L.Ed.2d 45] and it must also be rejected."

In this respect, however, one point raised by the Trustees is of particular interest. They characterize as a "governmental power" the City Council's "control and disburse(ment of) the 'profits' of utility operations up to 14 percent of gross revenues. . ." Would it not follow that the Board's control over and disbursement of the other 86 percent is likewise a "governmental power"?

Without the slightest authority to support their position, the trustees argue that republicanism applies only to "the city's one governing body, the San Antonio City Council." But Article IV, Section 4 of the United States Constitution plainly applies the term to the entire "form of government" in this case, the municipal corporation.

Numerous federal cases[10] are cited by the Trustees for the proposition that "the *appointment* of nonlegislative state or local officers not subject to election such as the Trustees here, is a matter of state discretion." Petitioners are in complete agreement. What the Trustees overlook is that each of the approved systems of selection rested upon *direct appointment by duly elected representatives.*

Petitioners' dispute is not with public appointment. It

10 Pages 5 and 6 of Respondent's Brief.

is clearly required by *Sailors v. Kent Board of Education*, 387 U.S. 105, 18 L.Ed.2d 659 (1966):

> "At least as respects nonlegislative officers, *a State can appoint local officials* or elect them or combine the elective and appointive system as was done here. (Emphasis added)."

Four members of the City Public Service Board are not appointed by "a State." Nor are they appointed by the City Council or any other elected body. The distinction is between the constitutionally valid process of election or public appointment on the one hand and the politically incestuous practice of self-perpetuation on the other.

II. Adjudication of the legality of a scheme by which the selection of public officers is placed beyond the direct or indirect control of the voters cannot, as a matter of law, involve a "political question."

Respondents' arguments on this point are notable for their lack of specificity.

Just what political remedy might the people of San Antonio employ to regain control of their electric and gas system? They can elect a mayor who is pledged to carry out their will, but their elected representative has only one vote out of five. Refinancing the bonds so as to eliminate the Board is not possible because of the stat-

utory prohibition against refunding them at the higher current interest rates. TEX. REV. CIV. STAT. ANN. arts 1111a, §2 and 1111b, §2 (1963). Four self-perpetuating trustees apparently have a federally enforced entitlement to their powerful positions; the Court of Appeals has so held. Political muscles cannot be flexed against vested contractual rights.

Neither the Respondents nor the Court of Appeals has disclosed any other political remedy or ownership right which may be exercised so as to significantly influence the Board's self-appointment process.

The sad fact remains that more public employees, funds and property in San Antonio are controlled by this self-perpetuating municipal bureaucracy than are controlled by the duly elected and publicly appointed governmental structure. In reality, a San Antonian's vote is less than fifty percent effective.

Congressman Henry B. Gonzales, commenting upon the difficulty of resolving energy problems in the community (San Antonio Light, July 15, 1979) summarized the dilemma succinctly:

> " 'It's a question of whether or not we can get San Antonio united. We can't afford to go at loggerheads with the City Public Service — it does everything in secret and accounts to nobody. This makes it very difficult.' "

Under the existing scheme, the appointment, reappointment or removal of these powerful officers is not a political question. But it should be!

III. A proper construction of TEX. REV. CIV. STAT. ANN. art. 1115 (1963) allowing the City Council of San Antonio to specify the organization and duties of the trustees and "the election of their successors" turns upon the application of federal constitutional and statutory law; it does not present points of state law beyond the jurisdiction of this Court.

For purposes of this appeal, Petitioners accept at face value Respondents' statement that Texas statutes — standing alone, do not prohibit the establishment of a self-perpetuating proprietary board. The vice in the construction which the statute has received lies in transgression upon controlling federal constitutional and statutory law. And whether the state cases under discussion do or do not support the validity of the scheme under Texas law is immaterial; none of the cases decided or purported to decide federal questions.

Respondents are apparently attempting to mislead the Supreme Court in the same manner in which they distracted the Court of Appeals — by asserting that the case is determinable under state claims which are beyond federal jurisdiction.

The substantive claims of Petitioners are purely federal. They encompass only the Guaranty Clause and Fourteenth Amendment to the United States Constitution and the Civil Rights and Voting Rights Acts.

In *Buckley v. Valeo*, 424 U.S. 1, 46 L.Ed.2d 659, 96 S.Ct. 612 (1976), this Court determined that the proper remedy for the rectification of an unconstitutional governmental form is to order that the body which created it restructure it within constitutional limits. Therefore, upon declaration that the Federal Election Commission was unconstitutionally appointed, Congress was afforded an opportunity to reorganize it in conformity with this Court's ruling.

Under Article 1115, the City Council of San Antonio had — and still has — the power to determine the structure of the City Public Service Board, subject, of course, to applicable federal limitations. Accordingly, this case should be remanded to the District Court in order that the City Council might, by proper ordinance, reconstitute the Board either by ordering its direct election or by instituting public appointment.

CONCLUSION

The opinion of the Court of Appeals has the alarming and, no doubt, unintended effect of bending and twisting the fundamental structure of the law. Public bodies enjoy certain well-defined powers, privileges and immunities and are subject to long-established

modes of accountability which are quite distinct from those enjoyed by and applicable to private entities. The boundary between the public sector and the private sector has always been and must remain a sharply defined line. Unfortunately, the opinion of the Court of Appeals creates a void between those mutually exclusive bodies of law. The City Public Service Board of San Antonio has been permitted to occupy that interspace. The Board enjoys the powers, privileges and immunities of both public and private entities but is subject to the accountability of neither. Such a result is contrary to public policy. Petitioners call upon the Supreme Court to impose accountability.

In THE FEDERALIST, No. 39 (Wright Ed. 1961) (J. Madison), Madison writes that one purpose of the Guaranty Clause is to protect the citizenry from an "oligarchy." BLACK'S LAW DICTIONARY (4th Ed. 1957) defines that term as "a form of government wherein the administration of affairs is lodged in the hands of a few persons." The City Public Service Board is an oligarchy.

It is noted in 4 ELLIOT'S DEBATES 195 (1891) that "[N]o state should have the right to establish an aristocracy or monarchy. That clause, (Article IV, Section 4) was therefore inserted to prevent any state from establishing any government but a republican one." The aristocratic characteristics of a self-perpetuating proprietary bureaucracy are patent. That self-perpetuation is accomplished by personal and dis-

cretionary assignment of public office rather than by procreation is immaterial.[11]

Madison asks in THE FEDERALIST, No. 43 (Wright Ed. 1961) (J. Madison), "[W]ho can say what experiments may be produced by the caprice of particular states, by the ambition of enterprising leaders or by the intrigues and influence of foreign powers?" There can be little question but that the contrivance in question is nothing more nor less than a capricious experiment, showing both ambition and enterprise, whereby the members of the San Antonio City Council of 1942 created and have maintained a powerful and indissoluble patronage device at the expense of the political and property rights of the citizens.

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11 See also Obdyke, Constitutional Law: Expanding Definition of Republican Form of Government under the Guaranty Clause, 13 Washburn Law Rev. (1974).

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of this brief were mailed with adequate postage thereon to:

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